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NO. _____
77-437

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

ROGELIO MARTINEZ,
RICHARD MARTINEZ and
ROGER MARTINEZ,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HAYNES & FULLENWEIDER
RAY A. BASS, III
2701 Fannin
Houston, Texas 77002
(713) 652-8939
Attorneys for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ or writs of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 13, 1977, affirming the judgment of the United States District Court for the Southern District of Texas entered on November 15, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It affirmed a judgment of conviction of

Petitioners for conspiracy to possess with the intent to distribute, and to distribute, heroin in violation of Title 21, United States Code, § 841(a)(1). Petitioners were tried in the District Court by a jury and there is no opinion of that Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1977. A Petition for Rehearing was denied on August 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence presented by the government, independent of the extra-judicial declarations of an alleged co-conspirator, was sufficient to support a finding that the Defendants-Petitioners participated in the alleged conspiracy?

2. Whether a verdict of guilty of a conspiracy count of an indictment can stand where the same jury, after receiving an "aiding or abetting" charge and a charge on the criminal liability of a conspirator for the criminal acts of co-conspirators, acquits the Defendants-Petitioners of all substantive offenses allegedly committed by co-conspirators as a part of and pursuant to the alleged conspiracy?

3. Whether the trial court erred in denying Defendants-Petitioners' Motion To Transfer The Case To The Houston Division of The Southern District of Texas For Trial?

4. Whether the trial court erred in permitting a government agent to testify that an alleged co-conspirator

told the agent that Defendant-Petitioner Rogelio Martinez had been in the narcotics business since 1945?

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. Const. Amend. V provides in part:

> . . . nor be deprived of life, liberty, or property, without due process of law. . . .

Fed. Rule Cr. Proc. Rule 18, 18 U.S.C.A.

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The Court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

Fed. Rule Evid. Rule 404(b), 28 U.S.C.A.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. Rules Evid. Rule 802, 28 U.S.C.A.

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

STATEMENT OF THE CASE

Petitioners were indicted in 1976 for conspiracy to possess with the intent to distribute, and to distribute, heroin in violation of 21 U.S.C. § 841(a)(1) (Count

I); for three counts of possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2 (Counts II, IV, and VI); and for three counts of distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The case was set for trial in the Laredo Division of the Southern District of Texas, the Honorable Robert O'Conor, Jr., presiding. The record showed that (1) the indictment against the Petitioners was returned by a federal grand jury sitting in Houston, Texas; (2) of the 35 overt acts listed under the conspiracy count, 18 were alleged to have occurred in Houston (including all eight overt acts allegedly committed by any of the Petitioners), and only nine overt acts were alleged to have been committed in Laredo; (3) of the six substantive counts alleged in the indictment, four were allegedly committed in Houston and only one in Laredo; (4) that each of the Petitioners was a resident of Houston and had been for at least 29 years; (5) that a trial in Laredo would disrupt the management of Defendant's business; (6) that Petitioners' lawyer lived and maintained his office in Houston; and (7) that the government prosecutor worked out of the Houston office of the United States Attorney for the Southern District of Texas.

On June 1, 1976, Petitioners filed a motion, pursuant to Fed. Rules Cr. Proc. Rule 18, 18 U.S.C., to transfer the case to Houston for trial; a memorandum of law in support of this motion was also filed on that date. On June 30, 1976, the government filed a memorandum in opposition to Petitioners' Motion to Transfer, requesting the court to take into consideration convenience of the government, and also the facts that co-defendants Carlos

Jesus Alvorado and Gerardo Garza were residents of Laredo and that their attorneys' offices were in Laredo.

On July 6, 1976, the trial court denied Appellants' motion to transfer the case to Houston. On August 23, 1976, prior to the commencement of trial, appellants renewed their motion to transfer when it was discovered that co-defendants Alvorado and Garza had pled guilty to Count I of the indictment and would testify for the government. The motion again was denied.

Trial commenced as to the Petitioners only on Monday, August 23, 1976. After the government rested its case, Petitioners moved for a judgment of acquittal which was denied by the trial court (R. 540, 549). Thereafter, no evidence was presented by the defense.

On three separate occasions the trial court, in its charge to the jury, gave an instruction on the law of principals with reference to the substantive counts of the indictment (R. 598, 602, 619). In addition, the trial court specifically instructed the jury that there was "another alternative basis" upon which the Petitioners would be guilty under the substantive counts of the indictment even if Petitioners "did not otherwise personally participate in the acts constituting that (substantive) offense or did not have knowledge of them" (R. 620-621). Under this alternative theory, said the trial court, the Petitioners would be guilty if they were members of the conspiracy and the substantive offense was committed by any other members of the conspiracy as a reasonably foreseeable part thereof (R. 620-621).

Notwithstanding the above instructions, on August 27, 1977, the jury returned verdicts of "not guilty" as to

each Petitioner on the substantive counts (II-VII), and verdicts of "guilty" as to each Petitioner on Count I. Each substantive offense had been submitted as an overt act under the conspiracy count (i.e. overt acts 11, 12, and 31). The remaining overt acts outlined the circumstances surrounding commission of the alleged substantive offense.

After the verdicts Petitioners moved for judgment of acquittal on Count I notwithstanding the jury's verdict; the motion was denied by the trial court.

Thereafter, on November 15, 1976, Petitioner Rogelio Martinez was sentenced to fifteen (15) years imprisonment, a twenty-five thousand dollar ($25,000.00) fine, with a special parole term of fifteen (15) years. Petitioner Richard Martinez was sentenced to ten (10) years imprisonment, a fifteen thousand dollar ($15,000.00) fine and a special parole term of ten (10) years. Petitioner Roger Martinez was sentenced to seven (7) years imprisonment, a ten thousand dollar ($10,000.00) fine and a special parole term of five (5) years. A joint Notice of Appeal was filed by the Petitioners on November 15, 1976.

Summary Of The Evidence

Evidence was introduced to show that on November 6, 1975, Drug Enforcement Administration (DEA) agent Albert Castro from San Antonio was introduced to an informant, Willie Quintana (hereafter called Informant), by D.E.A. Agent Max Pooley in Laredo (R. 123). The Informant told Agent Castro that Ramon Quintana had a pound of heroin or cocaine to sell and was looking for a customer, (R. 125). Agent Castro, with the aid of the Informant, contacted Ramon Quintana and arranged

a sale. The deal fell through, however, when Ramon Quintana informed Agent Castro that his source had already sold the heroin (R. 126-27).

On November 18, 1975, Agent Castro was again informed by the Informant that he had been contacted by Ramon Quintana about a possible sale of heroin. Arrangements were made for Ramon Quintana to travel to San Antonio to deliver the heroin to Agent Castro (R. 85, 127). On November 19, Ramon contacted Agent Castro and told him that the heroin was not in San Antonio, but was in Houston, and that a trip would be made to Houston to get the drugs (R. 86). Thereafter Hector Martinez, Gerardo Garza, and Informant left San Antonio (Hector, Garza, Informant, Carlos Alvorado and Ramon Quintana had all travelled to San Antonio for the deal) for Houston. At approximately 5:30 p.m., they were observed by DEA surveillance officers entering the city limits of Houston, driving a blue Pontiac station wagon[1] (R. 344). They appeared to be lost because they drove aimlessly around the city for some time (R. 345), but shortly before 8:00 p.m. they arrived at 1109 Moody Street in Houston, the residence of Petitioner Rogelio Martinez (R. 280, 345). Although Rogelio was not at home, his two sons, Richard Martinez and Roger Martinez, arrived shortly thereafter at their father's residence. Roger and Richard then had a short conversation with Hector, their uncle. Although no trial witness overheard the conversation which took place in the driveway, Gerardo Garza at the trial testified that when Hector came back to the car he stated that

1. They were driving a blue-colored Pontiac station wagon, Texas License Number FUZ 486. This vehicle was later shown to have been registered to Pablo Vasquez of Laredo, Texas (S. 237).

"his nephews told him that they didn't have the heroin just yet but could get it" and that "they only had four ounces of heroin but could get some more for him" (R. 283). Shortly thereafter, Hector Martinez, Informant and Gerardo Garza departed for San Antonio (R. 283). Later that evening Agent Castro received a telephone call from Hector Martinez who explained that the heroin could not be delivered because "he had missed his brother who was en route to Laredo and then on to Monterrey to acquire five pounds of heroin" (R. 87). Hector ended the conversation with an assurance that something would be arranged for Castro to get the quality of heroin for which he was asking (R. 87).

Agent Pooley testified that on November 22, 1975, he had been contacted by Informant, who had attended a meeting of Hector Martinez, Ramon Quintana, Carlos Alvorado, Gerardo Garza, an unidentified Latin male, and an unidentified Latin female. According to Informant, the unidentified male and female departed for Houston with five pounds of heroin in their possession (R. 234-35). San Antonio Police Officer Russell Reyna received a report from Agent Pooley that the couple was to deliver the heroin to Rogelio Martinez (R. 219).

On November 24, 1975, Ramon Quintana contacted Agent Castro to arrange the sale of five pounds of heroin for $100,000.00. The plan was for Castro to meet Informant in San Antonio and then travel to Houston where the exchange would take place (R. 88, 142, 158). At approximately 11:30 a.m. on that date Agent Castro and San Antonio police officer Russell Reyna picked up Willie Quintana in San Antonio, where he had earlier been dropped off by Hector Martinez, Carlos Alvorado

and Gerado Garza (R. 54, 88, 193, 286). Willie informed the agents that upon his arrival in Houston he was to contact Hector Martinez at telephone number 688-3273 (R. 89, 90). Before leaving San Antonio for Houston, officer Reyna was told by Agent Max Pooley that this telephone number was subscribed to by Roger Martinez at 5802 DeMilo in Houston (R. 196).

At 2:30 p.m. on the 24th, Hector Martinez, accompanied by Garza and Alvorado, arrived in Houston (R. 54, 443). They drove to the residence at 1109 Moody, and Hector Martinez went inside the home while Garza and Alvorado remained in the car (R. 24, 25, 469-470). Shortly thereafter, Petitioner Rogelio Martinez arrived, and he also went inside the house (R. 25, 471, 505). A few minutes later Hector Martinez returned to his travel companions, and they went to a Dairy Queen a few blocks away (R. 25, 441, 471, 505). At 3:30 p.m. they returned to 1109 Moody and Hector Martinez entered the residence (R. 26, 444, 505).

At 4:00 p.m. Agent Castro, Officer Reyna and Informant arrived in Houston, and at approximately 5:00 p.m. they checked into Room 138 at the Ramada Inn on Interstate 45 (R. 91, 160).

The testimony concerning the events which occurred at 1109 Moody after Hector Martinez and his friends returned to that location from the Dairy Queen is in conflict. Both Garza and Alvorado testified that they eventually left Moody Street to take Hector to the Ramada Inn to meet Informant (R. 27-28, 289). Both testified that prior to this departure Petitioners Richard and Roger Martinez arrived in a "black car" and remained in the front yard talking with Hector Martinez and

Petitioner Rogelio Martinez (R. 26-28, 287-288). Garza testified that after a short while the four men (Petitioners and Hector Martinez) went into the house and in a few minutes Hector came out claiming that he had an ounce of heroin and an ounce of "something else" and stating that they were "going to the Ramada Inn to look for Willie" (R. 287-289). Alvorado testified that while the Petitioners and Hector Martinez were standing in the front yard one of the "two boys (i.e. Richard and Roger Martinez) . . . gave a package to the other and he gave it to Hector Martinez"[2] (R. 27). Then, according to Alvorado, he and Garza departed with Hector Martinez for the Ramada Inn (R. 27-28).

On the other hand, the testimony of D.E.A. surveillance officers concerning the events at 1109 Moody after Hector's return from the Dairy Queen indicates the following;[3]

1. After returning from the Dairy Queen Hector Martinez and his companions parked their station wagon in front of the house and Hector exited the vehicle and entered the house (R. 452, 505).
2. Shortly before 4:50 p.m. Rogelio Martinez came out of the house, entered his vehicle (a blue

2. It is from this testimony that the government would seek to draw an inference that Petitioners delivered to Hector Martinez the heroin and cocaine samples which were sold to Agent Castro, by Hector Martinez, at approximately 7:30 p.m. at the Ramada Inn.

3. The surveillance officers made notes during their surveillance and later filed written reports based on those notes. Their memories at trial were refreshed by reading those reports. None of the surveillance officers, at least one of whom had an unobscured view of what occurred in front of the house, (R. 449) observed a meeting in the front yard.

pick-up) and drove to 5802 DeMilo, the residence of Roger Martinez (R. 505-506). He arrived at this location at 4:50 p.m. (R. 394) and did not leave until 6:15 p.m. at which time he, followed by the black Grand Prix of Roger Martinez which had been parked at the DeMilo address since at least 3:00 p.m. (R. 394), drove to the residence of Richard Martinez where he remained until 6:40 p.m. (R. 398). He then drove to the Northline Mall Shopping Center where he was under constant surveillance until approximately 7:45 p.m. (R. 398-399, 400, 510).

3. Meanwhile at 5:00 p.m. the station wagon with Hector Martinez and his friends departed 1109 Moody and was followed to the Ramada Inn on Interstate 45 (R. 454).
4. Between approximately 5:30 p.m. and 8:00 p.m., the surveillance officer with an unobscured view of the front of the house noticed nothing occurring at 1109 Moody (R. 449, 455).[4]

At 5:45 p.m. Informant, who was now at the Ramada Inn with Agent Castro and Officer Reyna, placed a telephone call to the 688-3273 number and asked to speak to Hector Martinez (R. 91, 162). According to Officer Reyna,[5] Informant discovered that Hector was not at the

4. In view of this testimony of the surveillance officers, the validity of the testimony of Garza and Alvorado concerning the meeting between all Petitioners and Hector Martinez and concerning the package exchange is extremely questionable. Note that the "black car" belonging to Roger Martinez was under constant observation from 3:00 p.m. to 6:40 p.m. According to surveillance officers, it had not arrived at 1109 Moody as late as 8:00 p.m. Between 5:00 p.m. and 8:00 p.m. Hector and his companions certainly were not at 1109 Moody, nor was Rogelio Martinez. Prior to 5:00 p.m. not one surveillance officer saw this meeting between Petitioners and Hector.

5. Informant was not present and did not testify at the trial.

location of the phone number so Informant gave his name and location to whomever he was speaking and requested this information be given to Hector[6] (R. 162). At 6:45 p.m. Hector Martinez phoned Room 138 of the Ramada Inn and "instructed Willie to be in front of the motel at 7:00 p.m." (R. 91, 92, 163). He followed this instruction, and at 7:10 p.m. he returned to the motel room accompanied by Hector Martinez (R. 92, 163). During this visit Hector delivered a sample of heroin[7] and a gift sample of cocaine to Agent Castro (R. 92). After being shown the $100,000.00 "flash roll" Hector demanded and received $1,400.00 for the heroin sample (R. 94, 166). The payment, reasoned Hector, was to demonstrate to his brother that the purchasers were acting in good faith (R. 94, 166). At 7:30 p.m. Hector Martinez departed the motel room, stating that he would return at 11:30 p.m. with the five pounds of heroin (R. 94, 167).

At approximately 7:35 p.m. surveillance officers observed Hector Martinez walking across the parking lot of the Northline Mall Shopping Center which is located near the Ramada Inn[8] (R. 399, 400, 510). There he was seen to meet with Richard and Roger Martinez who were occupants of a black Grand Prix[9] and Rogelio

6. Note that this is forty-five minutes after Hector had already been followed to the Ramada Inn by a surveillance officer.

7. A D.E.A. chemist testified that this sample contained 25.4 grams of 15.2% heroin (R. 259).

8. One of the surveillance officers testified that the shopping center is about six blocks from the Ramada Inn (R. 507), another said approximately one block (R. 398, 399).

9. This car was later shown to be registered to Petitioner Roger Martinez and was actually a Catalina.

Martinez who was in his pick-up (R. 399, 400, 508-510). Hector walked over to the Grand Prix, entered the vehicle and it departed the mall area[10] (R. 400).

At approximately 11:15 p.m. Alvorado and Garza returned to 1109 Moody to pick up Hector Martinez[11] (R. 79). At this time, Alvorado over-heard a conversation between the Petitioners and Hector Martinez which was "all about that they didn't want to let the powder go until we brought all of the money.[12]" (R. 32-33).

At 11:55 p.m. Hector Martinez returned to Room 138 at the Ramada Inn at which time he informed his

10. If Alvorado's testimony is believed this meeting at the Northline Mall never occurred. He testified that he and Garza took Hector to the Ramada Inn about 7:00 p.m. and waited outside while he went into the motel. Hector then came out and said he had sold the package, and the trio returned to Rogelio's house. About 45 minutes later they went to have dinner (R. 27-31). They returned at 11:15 p.m. to pick up Hector Martinez (R. 32, 79).

11. See footnote 10, *supra*.

12. In view of the testimony of surveillance officers, the validity of this testimony is highly questionable. Consider the following (1) According to Agent Scott, after leaving the Northline Mall at about 7:35 p.m., the black Grand Prix occupied by Petitioners Richard and Roger Martinez was seen again at about 8:00 p.m. at 1109 Moody, but it departed that address at 8:10 p.m., drove to the residence of Richard Martinez where it remained until at least 11:20 p.m. (R. 400, 430, 440); (2) Agent Mike Conway resumed surveillance at 1109 Moody at about 10:30 p.m. At 11:40 the black Grand Prix arrived occupied by Richard and Roger Martinez, both of whom got out and went into the house (R. 472). Conway testified that he did not know where Hector Martinez was at this time (R. 499). He made no mention of seeing the station wagon. At about 11:45, Rogelio Martinez and Richard Martinez exited the house and drove to 2804 Morrison Street, parked the Grand Prix and left in Rogelio's pick-up (R. 472); (4) Hector returned to Castro's motel room at 11:55 p.m. where he remained until 12:05 a.m. (R. 95, 168, 169); and (5) Garza testified that, after seeing the Petitioners at 1109 Moody just prior to taking Hector to the Ramada Inn for the first time, he never saw them again (R. 320-322).

customers (Castro and Reyna) that his brother wanted the money "out front" (R. 168). When the customers insisted that the heroin be delivered to the motel or in a public place, Hector stated that he would try to convince his brother to make delivery at the motel (R. 95, 169). Hector and Informant left the room at 12:05 a.m. (R. 95, 169). According to Alvorado he and Garza then drove Hector and Informant to the home of Rogelio Martinez (R. 34). No one was there except Rogelio and after Hector talked with him, Alvorado and Garza took Hector and Informant back to the Ramada Inn[13] (R. 34). Hector and Informant returned to Room 138 at 12:35 a.m., and this time Hector told Agent Castro that his brother would allow one of the customers to come to his house to observe the heroin provided he brought the money with him (R. 169). This the agent refused to do because "it was not safe to drive around with $100,000.00 in a strange town" (R. 169). Then Hector decided that he would call his brother. He picked up the phone, dialed a number and was heard to say "Hello, Rogelio. I am here with my clients" (R. 97). There followed a brief conversation with Hector explaining to the other party that the clients wanted to meet in a public place (R. 171). Hector then handed the phone to Castro and suggested that he speak with the person on the phone (R. 97). Over objection, Agent Castro described the telephone conversation that he then had in the following manner (R. 99):

13. Agent Gospodarek testified that at midnight, he picked up surveillance on the station wagon driven by Hector and his companions. According to him, the station wagon "drove around and around and around the hotel area, back over towards Moody Street, and just aimlessly drove around" for about half an hour. He did not see the station wagon stop at the 1109 Moody Street address (R. 511, 535-536).

> "I said — my first word was "Rogelio?". And he said "What's happening?" I said "Well, I understand that you want me to go to your house and my position is I want you to come to the motel. I have got a $100,000.00 here and I don't know whether you have the heroin or not." To which he replied that he had the heroin, and that it was just as good as the sample that he had sent to the motel and that the way it was going to be is I would go to his house and do it that way or not to do it at all, at which time he requested for me to get Hector back on the phone and I handed the phone back to Hector Martinez."

After the above described conversation, Officer Reyna began to express dissatisfaction with the progress of negotiations. Hector responded that he would again talk to his brother and try to arrange something (R. 172). At 1:10 a.m. Hector and Informant left the room (R. 230). Later Willie returned and informed the agents that Hector could set up a deal at an all-night service station (R. 230). During the period of time between Hector and Informant's departure from the room and Willie's subsequent return, Alvorado and Garza, according to Alvorado's testimony, drove Hector and Informant to the residence of Rogelio Martinez (R. 35). Only Rogelio was there and "they (Informant and Hector) talked to him—just about the money and the powder and they mentioned the fact that the clients would come two blocks away from the house" (R. 35).

At 1:20 a.m. Agent Castro received a telephone call from Hector Martinez. At this time Hector stated that "the deal would go in the morning in the daylight hours" (R. 103). Accordingly, at 9:15 a.m. Castro and Reyna met with Hector Martinez at a Denny's Restaurant

where they discussed several alternative methods of delivery (R. 104, 173, 174). This time agent Castro complained about progress of the negotiations and Hector requested one more chance to try to convince his brother to deal with them (R. 105). At 10:00 a.m. Hector left Denny's and was dropped off at 1109 Moody by Alvorado and Garza (R. 36, 350). A few minutes later, Hector was picked up by his companions as he was walking on the street "in the vicinity of the Moody Street address" (R. 350). At this juncture, Hector informed his companions that Rogelio did not want to go through with the deal because he was suspicious of the buyers (R. 295). Then Hector was taken to a lounge owned by Rogelio Martinez. He walked over to Rogelio's pick-up and appeared to engage in conversation with him (R. 350). He then returned to the station wagon where he informed his companions that Rogelio had said he didn't want to see Hector again, and had admonished Hector not to call him again (R. 352). However, at 10:55 a.m. Hector Martinez returned to the Ramada Inn and told Agent Castro that his brother had agreed that delivery could take place at a restaurant close to Regelio's house (R. 105). Castro agreed to this plan and Hector Martinez left the room, but at 11:30 a.m. he called and asked to speak to Informant (R. 105-106). Informant then left to meet Hector in front of the motel, but at 12:15 p.m. Informant called and stated that negotiations were terminated (R. 106). Shortly thereafter, Hector, Informant, Alvorado and Garza departed Houston and returned to Laredo (R. 37, 296).

On December 2, 1975, Agent Castro received a telephone call from Ramon Quintana, who stated that "his source" now had five pounds of heroin and that it was

selling for $19,200.00 per pound (R. 107, 108). Later that day, Agent Castro and Officer Reyna met with Gerardo Garza and Informant at the Laredo Airport in Laradeo, Texas (R. 108). Informant immediately inquired as to whether or not Castro had the money, and when Castro replied affirmatively, Informant placed a telephone call to Ramon Quintana (R. 109). About an hour later, Ramon arrived with Carlos Alvorado and a person introduced to Castro as Carlos, but who Castro later learned was Felix Alba (R. 110). Carlos (Felix Alba) told Castro that the heroin belonged to him, and he insisted that the transaction take place either at the home of Carlos Alvorado or the home of Ramon Quintana (R. 110). This Castro refused to do, and after further discussions it was agrdeed that a sample of heroin would be delivered to Castro at the airport (R. 111). Alvorado, Informant and Carlos (Felix Alba) left and later returned in a blue Plymouth,[14] a sample of heroin[15] was delivered to Agent Castro by Gerardo Garza (R. 112). At this point, Carlos (Felix Alba) insisted that the transaction take place at his home (R. 113). Castro and Reyna again insisted that delivery be made at the airport or some other public place (R. 113). It was then agreed that Alvorado and Garza would attempt to persuade Carlos to make delivery in a public place, but it was later determined that they "could not convince Carlos to release the heroin" (R. 113). At about 11:00 p.m., Castro and Reyna decided to terminate the negotiations (R. 114).

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14. It was later shown that this automobile was registered to a Willard Enard of La Marque, Texas, which is "almost in the backyard of Houston, Texas" (R. 238).

15. This sample was identified by a D.E.A. chemist as 24 grams of 15.3 per cent heroin (R. 276).

On January 5, 1976, Castro again talked with Ramon Quintana (R. 114). Quintana stated that he had nine ounces of heroin that he would sell for $1,700.00 per ounce (R. 115). Later, arrangements were made for Castro to meet Quintana at a specified location in San Antonio, Texas, on January 7, 1976, to deliver the heroin. At the designated location they observed Ramon Quintana sitting behind the wheel of a van, with an unidentified woman in the back seat (R. 118). At this time, Ramon Quintana and the woman, later identified as Maria Salivas Saenz, were arrested and twelve ounces of heroin were seized from the van (R. 119-120).

REASONS FOR GRANTING THE WRIT

1. Petitioners submit that the evidence is insufficient to support their convictions under Count I of the indictment for two reasons: First, the evidence, independent of the extra-judicial declartions of Hector Martinez, is insufficient to support a finding by the jury that Petitioners became aware of the plan to distribute heroin and, thereafter agreed to, or knowingly assisted, the accomplishment of that plan. Secondly, the evidence, considered in its entirety, is circumstantial and is insufficient to exclude the reasonable hypothesis, supported by the evidence, that Petitioners were used as a shield to protect the identity of the real source of the heroin.

a. It has long been the rule that the extra-judicial declarations of an alleged co-conspirator are not admissible against the defendant on trial unless the government has established by independent evidence the existence of a conspiracy and the defendants' participation therein. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86

L.Ed. 680 (1942); *United States v. Rodriguez,* 509 F.2d 1342 (5th Cir. 1975); *United States v. Apollo,* 476 F.2d 156 (5th Cir. 1973); *Montford v. United States,* 200 F.2d 759 (5th Cir. 1952). The test for determining the sufficiency of the independent evidence is whether or not it would be sufficient to support a finding by the jury (1) that a conspiracy existed and (2) that the defendant knowingly participated in that conspiracy. *United States v. Rodriquez,* supra; *United States v. Tyler,* 505 F.2d 1329 (5th Cir. 1975); *United States v. Oliva,* 497 F.2d 130 (5 Cir. 1974).

Count I of the indictment in this case charged a conspiracy (1) to possess heroin with intent to distribute and (2) to distribute heroin. The government's theory obviously was that the unlawful plan to possess and then distribute heroin to D.E.A. Agent Albert Castro was initiated by and between Ramon Quintana, Hector Martinez, Carlos Alvorado and Gerardo Garza, and that, thereafter, Petitioners knowingly, willfully and intentionally, participated in the unlawful scheme. In order for each Petitioner's conviction on Count I to be sustained the evidence, independent of the extra judicial declarations of alleged co-conspirators, must, at least, be sufficient to support a finding by the jury that he became aware of the plan to distribute heroin to someone outside of the conspiracy and, thereafter, agreed to, or knowingly assisted, the accomplishment of that plan.

Viewed in the light most favorable to the government, the independent evidence shows the following:

(1) On November 19, 1975, Petitioners Richard and Roger Martinez met with their uncle, Hector Martinez, at the home of their father, Rogelio Martinez.

(2) On November 24, 1975, all three Petitioners met twice with Hector Martinez at the home of Rogelio Martinez. At the first meeting a package was delivered to Hector. At the second meeting there was some conversation, over-heard and vaguely recalled by Carlos Alvorado, "all about that they didn't want to let the powder go until we brought the money."

(3) On November 24, 1975, all three Petitioners met with Hector Marintez at the Northline Mall Center.

(4) On November 25, 1975, there were two additional meetings between Hector Martinez and Petitioner Rogelio Martinez. Petitioners Richard and Roger Martinez were not present. The first meeting occurred about 1:00 a.m. at Rogelio's home. Informant was also present and Carlos Alvorado vaguely recalled over-hearing some conversation which was "just about the money and the powder and they (Informant and Hector) mentioned the fact that the clients would come two blocks away from the house." The second meeting was at about 10:30 a.m. and Hector and Rogelio appeared to argue.

(5) On November 24, 1975 at about 5:45 p.m. Informant unsuccessfully attempted to contact Hector Martinez by dialing a telephone number shown to be listed to Roger Martinez.

(6) On November 25, 1975, at 12:50 a.m. Agent Albert Castro had a telephone conversation with a person who had been called by Hector Martinez and who (1) claimed that he had sent the heroin sample to Castro, (2) said that he had the remaining heroin and (3) insisted that the transaction take place at his home.

Several observations about the above recited evidence should be noted. First, Informant's attempt to contact

Hector Martinez at a phone number listed to Roger Martinez suggests nothing more than the fact that Hector knew his nephew's phone number and might be at his home. Second, apart from the hearsay declaration of Hector Martinez, Agent Castro's telephone conversation with a person unknown to him at 12:50 a.m. on the 25th has no significance in terms of the Petitioner's criminal liability. Third, there is no showing that the package allegedly delivered to Hector Martinez contained heroin or any other contraband. Of course, the government would seek to draw an inference that it contained the heroin and cocaine samples delivered to Agent Castro at the Ramada Inn. The Fifth Circuit, however, has consistently refused to draw such inferences under similar, if not identical situations.[16] See, *Panci v. United States*, 256 F.2d 308 (5th Cir. 1958); *Gutierrez v. United States*, 314 F.2d 334 (5th Cir. 1963).

Petitioners Richard and Roger Martinez

Richard and Roger Martinez were not present during the conversation where it was mentioned "that the clients would come two blocks from the house." Thus, there is nothing to suggest that they knew of Hector's plan to distribute heroin. The most that could be inferred is a conditional acquiescene in Hector's desire to obtain heroin for whatever reason, perhaps personal use, provided he had the purchase price. Assuming there was an attempted sales agreement with Hector, it was never consummated. Even had it been, it is clear, that absent some prior or

16. The jury, in light of its verdicts on Counts II through V, obviously rejected this evidence (shown to be extremely questionable, see Footnote 4, supra) and the inference favored by the government.

contemporaneous understanding beyond a mere sales agreement, the relationship of buyer and seller does not establish a conspiracy. *United States v. Cook,* 461 F.2d 906 (5th Cir. 1972); *United States v. Ford,* 324 F.2d 950 (7th Cir. 1963); *United States v. Varelli,* 407 F.2d 735 (7th Cir. 1969). In such a relationship there is no common goal or objective because, "the buyer's purpose is to buy; the seller's purpose is to sell." *United States v. Ford,* supra. This case falls squarely within the caveat issued by the Supreme Court in *Direct Sales Co. v. United States,* 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943):

> "There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." 319 U.S. 703, 712.

The Court added an explanatory footnote to the above caveat:

> "This may be true for instance, of single or casual transactions, not amounting to a course of business, regular, sustained, and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiesence in his desire to purchase, for whatever end." 319 U.S. 703, F.N. 8.

Compared to the independent evidence characterized in *Apollo v. United States,* 476 F.2d 156 (5th Cir. 1973) as "skimpy" and "marginally sufficient", the independent evidence here, as to Richard and Roger Martinez, is

flimsy and clearly insufficient. The evidence in *Apollo* was much stronger. In summary, it showed four meetings between Apollo and the declarant co-conspirator (Cocroft) over a two week period of time, at least one of which occurred immediately after a large shipment of marijuana was received by Cocroft. At this latter meeting Apollo entered the bedroom where the marijuana was stored, and returned with a plastic sack containing what appeared to be compressed bricks of marijuana. There were also two conversations between Apollo and Cocroft in the presence of a third party, who testified and clearly related the details of the conversations, which clearly demonstrated "that Apollo was aware of Cocroft's involvement with one or more other parties in a large-scale operation to illicitly import and distribute marijuana" and which clearly "indicated that Apollo was fully aware that he was the product out-let and the source of cash inflow that enabled the unlawful plan to operate." 476 F.2d 156, 162. The Court also noted that there was proof of a continuing relationship between Apollo and Cocroft.

Finally, as to Petitioners Richard and Roger Martinez, even if it be assumed that they became aware of Hector's plan to distribute heroin, there is nothing to suggest that they, thereafter, agreed to, or knowingly assisted, that plan. Indeed, the evidence is to the contrary. Whatever their motives may have been, they refused to comply with Hector's wishes to obtain heroin. Cases such as *United States v. Cianchetti,* 315 F.2d 584 (2nd Cir. 1963) and *United States v. Spanos,* 462 F.2d 1012 (9th Cir. 1972), make it clear that refusal to further the success of the unlawful enterprise, regardless of reason therefore, prohibits a finding of participation in the conspiracy.

Petitioner Rogelio Martinez

As to Rogelio Martinez, the independent evidence is strikingly similar to that held insufficient in *United States v. Spanos,* 462 F.2d 1012 (9th Cir. 1972). The conspiratorial theory in *Spanos* was that Godwin, a testifying co-conspirator, was to find buyers, then obtain the stimulant pills from Spanos and deliver them to the buyers. The independent evidence showed that Godwin on one occasion actually bought 50,000 amphetamine tablets from Spanos which were sold by Godwin to undercover agents. On two subsequent occasions Spanos agreed to sell large quantities of pills to Godwin, but later refused because "he knew he was being followed." On one of these subsequent occasions Spanos actually met with "the people" (intended purchaser's from Godwin), one of whom expressed satisfaction with "the merchandise we had gotten before." Spanos' reply to this potential buyer was "he didn't want to do business at *that time* because he knew he was being followed." (Emphasis added). The Court noted that the independent evidence showed that Godwin sold the 50,000 pills that he initially obtained from Spanos to Herring, a government agent. But, said the Court, "there is no evidence that Spanos had agreed with Godwin that Godwin was to resell to Herring or anyone else." 462 F.2d 1012, 1015. In closing the Court also noted that in selling these 50,000 pills, Spanos "presumably (knew) that Godwin would resell" but "Spanos refused to make further sales, when for the first time (so far as the evidence shows) he learned the extent of Godwin's sales and to whom he was selling." 462 F.2d 1012, 1017. Finally, the Court observed that Spanos' "motives . . . were not laudable, but as *Cianchetti* holds, that is immaterial." 462 F.2d 1012, 1017.

If anything, the independent evidence as to Rogelio Martinez is weaker than that held insufficient in *Spanos.* Unlike Spanos, there is no direct testimony here that Rogelio actually sold or delivered drugs to Hector. Nor is there any evidence of positive agreements to sell drugs to Hector followed by a change of mind. From all that appears from the independent evidence, Hector attempted to obtain drugs from Rogelio who, regardless of his motive, continuously refused to comply. The evidence simply will not support a finding that Rogelio Martinez knowingly participated in Hector's plan to distribute heroin.

b. The evidence presented by the government against these Petitioners when considered in its entirety is, at best, circumstantial. The test for determining the sufficiency of the evidence in such cases is whether or not reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence." *United States v. Olivia,* 497 F.2d 130 (5th Cir. 1971); *Cuthbert v. United States,* 278 F.2d 220 (5th Cir. 1960). Petitioners submit that the evidence should be considered in the light most favorable to the Petitioners, because they prevailed on six of the seven counts; and the jury, therefore, obviously rejected certain inferences which might have been drawn from the evidence. But, even if the evidence is considered in the light most favorable to the government, it is insufficient to eliminate the reasonable hypothesis, clearly raised by the evidence, that Hector Martinez used his association with the Petitioners to conceal the identity of his real source of heroin.

When Hector Martinez delivered his sample ounce of heroin to Agent Castro and Officer Reyna, and the terms of the exchange were agreed upon, Hector arranged to

deliver the five pounds four hours later, at 11:30 p.m. It stands to reason that this delay was necessary for Hector to obtain the heroin, since later negotiations proved that Hector had no qualms about making the exchange at any hour. This is substantiated by Garza's testimony that, upon returning to the car from the 7:30 meeting, Hector told Alvorado and Garza that "we are going to have to wait until later in the evening to receive the quantity that we were supposed to get." (R. 291) Yet, Hector Martinez was not even under surveillance from 8:00 p.m. to 11:00 p.m. (when the surveillance officers returned to their homes, apparently to watch the Houston Oilers—Pittsburgh Steelers football game) (R. 511, 532-535).

The trial testimony revealed so many contradictions among the government witnesses,[17] and there were so

17. E.g.: (1) Alvorado testified that the sample ounce of November 24, was delivered by Richard and Roger to Hector while they were in front of the house at 1109 Moody Street (R. 27). However, the agents testified that when he arrived at 1109 Moody, Hector got out of the car and went into the house (R. 452, 505). Garza's testimony discloses no heroin transfer, but merely that Hector told them on the way to the motel that he had an ounce of heroin and a half-ounce of something else. (2) Alvorado and Garza both testified that they returned Hector to 1109 Moody after the 7:30 meeting (R. 28, 290); the agents testified that Hector met Petitioners at Northline Mall and departed in the black car (R. 399, 400, 508-510). (3) Alvorado testified that he over-heard a conversation in the yard at 1109 Moody at about 11:15 p.m. between all three Petitioners and Hector, which was "all about that they didn't want to let the powder go until we brought all of the money." (R. 32-33). Garza testified that he never saw any of the Petitioners again after 5:30 or 6:00 p.m. Agent Mike Conway testified that he resumed surveillance at 1109 Moody at 10:00 p.m.; that Roger and Richard arrived at 11:40 p.m., and went into the house; that Rogelio and Richard left the house at 11:45 p.m.; and that he didn't know where Hector was at this time and couldn't recall seeing him at 1109 Moody (R. 472, 499).

many persons absent whose testimony might have been crucial (e.g.: Hector Martinez, Willie Quintana, Ramon Quintana, Felix Alba), that it is obvious why the jury acquitted the Petitioners of the substantive counts: they knew that the truth had not been disclosed. There were just too many inconsistencies, contradictions, and gaps in the evidence.

It is clear that during the period of time when Agent Castro was attempting to purchase heroin, i.e., November 5, 1975 through January 7, 1975, Hector Martinez was associated with a number of persons, one of whom, Ramon Quintana, was the apparent motivating force in the alleged conspiracy. Ramon, in turn, had at least several apparent sources of heroin, one of whom was clearly identified as Felix Alba, who was allegedly the source of the heroin sample delivered to Agent Castro at the Laredo airport on December 2, 1975 (R. 110). The similarities between the heroin sample delivered at that time (24 grams of 15.3% heroin; R. 276) and the heroin sample delivered to Agent Castro at the Ramada Inn in Houston on November 24th (25.4 grams of 15.2% heroin; R. 259) is at least consistent with the hypothesis that both samples emanated from the same source. It is also significant that Felix Alba (Carlos Doe) was driving an automobile registered to Willard Enard of La Marque, Texas which is "almost in the backyard of Houston, Texas" (R. 238).

The mysterious absence of Ramon Quintana during the negotiations in Houston on the 24th and 25th of November is, likewise, very curious. Or, does the record in fact reveal a very real possibility that Ramon was in Houston at that time? The original sworn statement of

Carlos Alvorado stated that on the 24th of November, Ramon Quintana accompanied Alvorado and his companions to Houston (R. 66-69). Overt act number eight under Count I states that on November 24, 1975,

> " . . . *Ramon Quintana,* Hector Martinez, Gerardo Garza and Carlos Alvorado *left San Antonio,* Texas for *Houston, Texas* where they were to meet with narcotic law enforcement personnel acting in an undercover capacity." (Emphasis Added).

The relationship between Hector Martinez and Informant, Ramon's half-brother, is a significant point. It is apparent that every time there was an argument between Hector and Castro about how the "deal would go down", Informant would leave the room with Hector, who would later return with another plan (R. 230).

There was also testimony, developed on cross-examination by the defense, that on November 22, 1975, Ramon Quintana, Informant, Hector Martinez, Carlos Alvorado and Gerardo Garza met at a bar in Laredo, Texas with an "unidentified Latin male and unidentified Latin female" who had five pounds of heroin in their possession and who left for Houston with that heroin (R. 234-235).

Finally, and perhaps most significant of all, is Hector's actions after his last meeting with Petitioner Rogelio Martinez. At 10:30 a.m. on the 25th, Hector was told by his brother, Rogelio Martinez, "not to call him again, not to make any phone calls to him again and not to see him again" (R. 295). And yet, twenty-five minutes later Hector arrived at the Ramada Inn and stated that his brother had agreed to deliver the heroin at a small cafe and suggested that agents Castro and Reyna, who had

never seen Rogelio, go to that location with the $100,000.00 (R. 152-153, 175).[18]

Appellants would invite this Court's attention to the case of *Ong Way Jong v. United States,* 245 F.2d 329 (9th Cir. 1957). The conviction there, on facts remarkably similar to the case at bar, was reversed on grounds of insufficient evidence. In over turning the conviction the Ninth Circuit Court noted that "It is conceivable that Wee (the person from whom agents purchased narcotics) was using his association with Ong as a blind to hide his real 'connections.' " 245 F.2d 392, 396. The evidence in this case is even more suggesitve of such an hypothesis than was the evidence in Ong Way Jong. There it was noted that during the period of time in question Wee "associated with no one" other than Ong Way Jong. 245 F.2d 392, 393. As demonstrated, such is clearly not the case at bar. Moreover, in Ong Way Jong, the only suggestion that Wee may have obtained, from another source, the heroin which allegedly came from Ong was the government's stipulation that the heroin received from Wee by undercover agents on one occasion was not supplied by Ong, 245 F.2d 392, 394, and Wee's claims during negotiations that he had many sources. 245 F.2d 392, 393. Although the government did not stipulate to it, the jury, by its verdicts on Counts II through VII, obviously found that Petitioners did not supply the heroin samples delivered to Castro on November 24th and December 2, nor were they connected with the heroin seized from Ramon Quintana on January 7, 1976.

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18. Note also the curious activities beginning about midnight on the 24th when Hector claimed he was trying to convince his brother to make delivery at the motel or at a public place. See appropriate section of *Summary Of The Evidence,* including footnote 13, *supra.*

Unlike Ong Way Jong, there is specific evidence in this case, as already suggested above, which clearly raises the hypothesis that Petitioners were being used as a shield to protect the identity of the real source. This case clearly demands application of the often stated rule that circumstantial evidence, to be sufficient for conviction, must eliminate every reasonable hypothesis of guilt. If that rule has meaning, it should be applied here.

2. In circumstances such as those of the instant case, where there is no question that the conspiracy in which the Petitioners allegedly participated resulted in the commission of the substantive crimes charged; where the evidence linking the Petitioners to the conspiracy was necessarily found inconclusive by the jury; where the rationale supporting the approval of inconsistent jury verdicts does not apply; and where there is extreme likelihood that the guilty verdict on the conspiracy count was influenced by a prejudicial hearsay statement; the conviction should be reversed.

In *United States v. Peterson,* 488 F.2d 645 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit reversed a conviction for conspiracy where the defendant had been acquitted by the same jury on all substantive counts of the indictment, the elements of which closely approximated the overt acts alleged under the conspiracy count. In doing so the Court stated:

> "Concedely, a conspiracy to commit a crime is a separate and distinct crime from the substantive offense. But this distinction may become tenuous where *after receiving a 'aiding or abetting' charge,* a jury exonerates a defendant on the substantive counts the elements of which closely approximate,

> if not parallel, the overt acts alleged in the conspiracy charge . . . [B]ased on the unique facts presented by the record, *it is difficult to conceive of how the jury could exculpate Dr. Peterson as an aider or abettor but yet inculpate him as a confederate.*" 488 F.2d 645, 651 (Emphasis Added).

In light of the pleadings, the evidence presented at trial and the prosecutorial theory[19] advanced and clearly articulated in the Court's charge, the jury's verdicts of acquittal on the substantive counts in the case at bar are even more significant than the acquittals in *Peterson.* The theoretical distinction between the substantive crime and the conspiracy to commit it certainly becomes tenuous where the jury, after receiving not only an "aiding or abetting" charge, but also a charge on the substantive criminal liability of co-conspirators, acquits the defendant on all substantive offenses, the evidentiary proof of which closely approximates, if not precisely parallels, the overt acts alleged in the conspiracy count. It is impossible to conceive of how the jury could exonerate Petitioners on Counts II through V, involving delivery of the heroin and cocaine samples allegedly obtained from the Petitioners and delivered to Agent Castro as a part of the alleged conspiratorial scheme to sell him five pounds of heroin, and yet properly convict Petitioners on the al-

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19. The government's theory at trial was that since Petitioners were members of the conspiracy they were criminally liable for every criminal act committed by other members of the conspiracy as a part thereof (R. 544). The charge on principals was also submitted obviously on the proposition that the alleged conduct of Petitioners in furtherance of the attempt to sell heroin to Agent Castro on the 24th, conduct which made Petitioner's co-conspirators, was conduct which resulted in Petitioners aiding and abetting the substantive offenses.

leged conspiracy.[20] Had the Petitioners on this same record, been first tried and acquitted on the substantive counts, a conviction on the conspiracy count at a subsequent trial clearly could not stand. *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948). The same result would follow had the present jury, although acquitting on the substantive offense, been unable to reach a verdict on the conspiracy count. *Williams v. United States,* 179 F.2d 644 (5th Cir. 1951), aff'd 341 U.S. 70. This Court's holding in *Peterson* makes it clear that these Petitioners cannot be penalized simply because economy, judicial and otherwise, results in the trial of conspiracy and related substantive counts to a single jury.

The concept that evidence once rejected by a jury should not again be considered against the accused in support of a closely related, but separate and distinct, offense has long been accepted by the Fifth Circuit. See, e.g. *Yawn v. United States,* 244 F.2d 235 (5th Cir. 1957); *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972). Although *Yawn* and *Wingate* both deal with the exclusion of evidence rejected by a previous jury, this Court's opinion in *United States v. Peterson,* 488 F.2d 645 (1974) clearly suggests that the same concept ap-

20. The probable explanation for this patent inconsistency is the prejudicial effect of admitting the hearsay declaration of Hector Martinez that his brother, Petitioner Rogelio Martinez, had been in the narcotics business since 1945. (See reason number four). Such prejudicial testimony in a narcotics case, coupled with nothing more than a showing of mere association with a person (Hector Martinez) who, at the time, is actively engaged in a scheme to sell five pounds of heroin, would probably compel most American juries to take the position that the Petitioners on trial ought to be found guilty of something. A conspiracy allegation is tailored to accommodate such prejudicial reasoning.

plies with reference to evidence obviously rejected by the same jury. Early Circuit Court opinions, indeed, held that a conviction under a multi-count indictment could not be sustained unless the evidence, independent of that rejected by an acquittal on separate counts under the same indictment, was sufficient to sustain the conviction. *Rosenthal v. United States,* 276 F. 714; *Peru v. United States,* 4 F.2d 881; *Murphy v. United States,* 18 F.2d 509; *Boyle v. United States,* 22 F.2d 547; *Speiller v. United States,* 31 F.2d 682; *Frisna v. United States,* 49 F.2d 733. This view is consistent with the long established principle that on appeal, the evidence must be viewed in the light most favorable to the jury's verdict. *Evans v. United States,* 257 F.2d 121 (9th Cir. 1958); *United States v. Blake,* 484 F.2d 50 (8th Cir. 1973); *United States v. Valdez,* 431 F.2d 622 (8th Cir. 1970). Those cases holding that on appeal the evidence must be viewed in the light most favorable to the government merely state an expression of the same rule where the government has prevailed below. Such is not the case under a multi-count indictment where the government has prevailed as to one count, the defense as to six.

The jury obviously rejected at least the following three portions of evidence, since the acceptance of any one of these portions would have provided a direct link to the conspiracy and the substantive crimes perpetuated in the furtherance thereof. The testimony of Carlos Alvorado concerning the exchang of the sample ounce, and concerning the overheard 11:15 p.m. conversation between Hector Martinez and the Petitioners "all about the money and the powder and that they didn't want to let the powder go until we brought the money" was undoubtedly rejected. (See Footnotes 4, 12, and 17, *supra*). Finally, the jury

must have rejected the extra-judicial declarations of Hector Martinez which identified Petitioners as his source, otherwise they surely would have found Petitioners guilty (at least as aiders and abettors) under Counts II through V.

Stripped of the evidence obviously rejected by the jury, the government's case for a conspiracy reduces to nothing more than a showing of two meetings between a father, his sons and their uncle, one at the father's home and one at a public shopping center; and two additional meetings between the father and his brother, Uncle Hector. In short, a showing of mere association with Hector Martinez, an alleged co-conspirator. The Fifth Circuit has repeatedly held that such evidence is not sufficient to support a finding of conspiracy. *United States v. Morrow,* 537 F.2d 120 (5th Cir. 1976); *United States v. Murray,* 527 F.2d 401 (5th Cir. 1976); *United States v. Tyler,* 505 F.2d 1329 (5th Cir. 1975); *United States v. Arroyave,* 477 F.2d 157 (5th Cir. 1973); *Panci v. United States,* 256 F.2d 308.

Since Justice Holmes delivered his last opinion in *Dunn v. United States,* 284 U.S. 390 (1932), federal courts have been reluctant to question inconsistent jury verdicts. *Dunn* takes a two-pronged approach in allowing inconsistent jury verdicts. The first approach reasons that inconsistent verdicts are justified because, if separate indictments had been presented against the defendant and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Clearly, this reasoning is no longer valid where determination of the same issue or fact is crucial to each indictment. *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed.

180 (1948). The *Sealfon* Court recognized that res judicata may be a defense in a second prosecution, dependent upon whether the jury's verdict in the first (conspiracy) trial was a determination of the facts essential to conviction of the second (substantive offense) trial, as decided by the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial. 332 U.S. at 578-79.

The second consideration in support of the *Dunn* holding is that the jury's acquittal on one count was erroneous —an "assumption of power which they had no right to exercise, but to which they were disposed through lenity." 284 U.S. at 393. Succeeding federal court decisions have recognized other conditions which serve to excuse inconsistent jury verdicts, as in cases where inconsistency is necessary to achieve unanimity or where there are confusing and narrow distinctions amount to counts in multi-count indictments. (e.g., see *United States v. Maybury,* 274 F.2d 899 (2nd Cir. 1959)). However, in Petitioners' case, it is very doubtful that the jury was disposed toward lenity. The alleged criminal conduct, dealing in hard drugs, has been condemned by society as a whole for many years. Additionally, the hearsay evidence that Petitioner Rogelio Martinez had been in the business since 1945 would serve to increase the enmity felt for heroin traffickers. Here there was no mistake-inducing standard, and no complex or razor-thin difference between the conspiracy count and the substantive counts. In fact, if a mistake were made, it is likely that it was made in consideration of the conspiracy count, since the jury requested supplemental instructions on that issue after having begun deliberations. The obvious truth is that there was a conspiracy which sold heroin to government

agents, and that the jury found that the Petitioners were not guilty of the substantive charges because they were not members of the conspiracy.

3. The trial court's denial of Petitioner's Motion to Transfer the Case to the Houston Division of the Southern District of Texas for Trial constituted reversible error. The affirmation of this denial by the Fifth Circuit is in direct conflict with that court's opinion in *DuPoint v. U.S.*, 388 F.2d 39 (5th Cir. 1967). Although under Rule 18, F. R. Cr. P. the trial court in a multi-division district has discretion to fix the place of trial within the district, that discretion is abused and reversal of the conviction is required when the offense with which the defendant is charged allegedly occurred in the division where he resides, but he is required to stand trial in a foreign division without due regard to the resultant inconvenience to him. Under Rule 18, convenience to the government is not a factor. Such is precisely the situation in the case at bar.

In *DuPoint* the Fifth Circuit reversed a conviction for possession of an unregistered distillery because the defendant had been required to stand trial, over objection, in a division which was approximately forty-two miles from the boundaries of the division in which he resided and within which his alleged criminal conduct occurred. Unlike the Petitioners in the case at bar, DuPoint did not object on grounds that trial in the foreign division was inconvenient but, instead, erroneously relied upon former Rule 18 which required trials in a multi-division district to be in the division where the offense ocurred. Nevertheless, the Fifth Circuit held that the trial court's failure to give due regard to the convenience of the defendant was "plain error" under Rule 52(b) which required a

reversal. In response to the government's argument that *DuPoint* had failed to allege any particular inconvenience and, thus, no prejudice had been shown, the court made the following observations:

> "That a defendant should be tried in the division in which the offense was committed, especially when he resides there, is not lightly to be evaded. The real effect of Rule 18 is that it is not to be done except with due regard for the defendant's convenience and that of the witnesses. The *convenience of the government is not a factor.* As evidenced by the constitutional requirement that none shall be prosecuted outside the district in which the offense is committed, *it is the public policy of this country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government.*" 388 F.2d 39, 44 (Emphasis Added).

To hold that this case can be distinguished from *DuPoint* on the tenuous proposition that some of the overt acts alleged in the indictment occurred in Laredo and, thus, the offense was partially committed in Laredo, would be to ignore the spirit of Rule 18. The criminal conduct allegedly engaged in by these Petitioners, according to the government's witnesses, literally occurred in their own backyard, some four hundred miles from the place in which they were required to defend themselves. Moreover, the critical inquiry under Rule 18, clearly articulated by the court in *DuPoint*, is not the locality of the offense but convenience to the deefndant and to the witnesses. Locality of the offense has relevance only insofar as it is a barometer of convenience. Under Rule 18, not a single factor should be weighed for the government convenience.

Against the background of the policy underlying Rule 18, it is clear that the trial court abused its discretion in requiring these Petitioners to stand trial four hundred miles away from the locality of their residence and the locality of their alleged wrong doing. The inconvenience and the prejudice to these Petitioners of a one week trial in a foreign locale four hundred miles away is obvious. The travel, lodging and eating expenses alone for the three Petitioners and their attorney cannot be ignored. The loss of the indispensible ability to demonstrate, through in-trial investigation, the inaccuracies of testimony concerning various persons, places and things surrounding the locality where the defendant allegedly engaged in criminal conduct, is a loss which every trial lawyer knows is a serious disadvantage for his client. Moreover, the subtle prejudice which a local jury may have against a foreign resident accused of criminal conduct by "home town boys" (Alvorado and Garza) is surely a factor which is entitled to some weight under Rule 18. Although Petitioners' Motion To Transfer was not accompanied by affidavits from defense witnesses who could have testified for these Petitioners had trial been conducted in Houston, this Court can and should take notice of a serious handicap to the defense that is present in all criminal cases, to wit: details of the alleged criminal activity such as exact date, time and place, cannot be discovered by the defense prior to trial. Those details are learned only as the government's testimony begins to unfold. Access to potential witnesses once those details are learned is non-existent when the trial is conducted four hundred miles away from where the criminal activity allegedly took place.

It is likewise apparent that convenience to the witnesses was not a factor which weighed in favor of a trial in Laredo as opposed to Houston. Of the fourteen witnesses presented by the government, five were from Houston (four hundred miles away), two were from San Antonio (approximately one hundred and fifty miles from Laredo and two hundred miles from Houston), and two were from Dallas, (approximately six hundred miles from Laredo and two hundred miles from Houston). It is apparent that a trial in Houston would have been more convenient for all concerned.

Petitioners submit that if Rule 18 is ever to be anything more than mere technical verbage which, under the guise of an exercise of discretion, can always be ignored by the trial court, then their convictions on Count I of the indictment must be reversed.

4. The trial court should have granted Petitioners' Motion for Mistrial after D.E.A. Agent Albert Castro testified that Hector Martinez told him that Petitioner Rogelio Martinez had been in the narcotics business since 1945. During negotiations between D.E.A. Agent Albert Castro and alleged co-conspirator Hector Martinez on November 24, 1975 at the Ramada Inn at Houston, Texas, Castro insisted that the contemplated delivery of five pounds of heroin take place in his motel room or some convenient public place. At this point in the testimony the following exchange occurred between the government's attorney and the witness, Albert Castro (R. 100):

"Q. Did you have any further conversation with Hector Martinez in the room?

A. Yes, sir. He said he was going to try to convince his brother (Rogelio Martinez) to do it.

Q. Was there any further conversations about his brother in the room?

A. Okay. During the conversation with me after he (Hector Martinez) hung up the phone, he stated that his brother was a hard man to convince, and that he had been in this business for some time, since 1945—

Mr. Bass (Defense Counsel): Excuse me, your Honor. May we approach the bench?

At this point counsel for Petitioners renewed his "continuing objection to the hearsay features of that conversation with Hector Martinez" and also objected on grounds that the witness' response injected into the trial, at a time when no issue had been affirmatively contested, an extraneous offense (R. 100-101). Counsel also moved for a mistrial (R. 101). The trial court overruled the objection and denied the Motion for Mistrial (R. 102).

It is a rule of universal acceptance that the accused in a criminal case is to be tried on the merits of the specific allegations charged in the indictment and not for being a "criminal generally". Evidence of the defendant's evil character or that he has engaged in specific acts of misconduct other than that alleged in the indictment generally must be excluded, not because it is without probative value but, on the contrary, because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Indeed,

the evil sought to be prevented is clearly demonstrated in the case at bar. The jury, obviously not truly convinced beyond a reasonable doubt that Petitioners were "aiders and abettors" or members of the alleged conspiracy as witnessed by their verdicts on Counts II through VII, nevertheless could not bring themselves to completely exonerate the Petitioners, most likely because of the prejudicial effect of the complained of "bad man evidence."

A number of exceptions to the general rule excluding evidence of extraneous acts of misconduct have evolved. Those exceptions which are narrowly limited, involve situations where the extraneous transaction has a high degree of probative value on a contested and material issue in the case and where the need for such evidence, coupled with its high degree of probative value, clearly outweighs the prejudicial effect it may have to the accused. The case law establishes the following prerequisites to the admissibility of evidence of extraneous misconduct: (1) the proffered evidence must plainly, clearly and convincingly establish that the defendant engaged in conduct similar to that for which he is being tried; (2) a finding that, if the defendant did engage in such conduct, such fact logically tends to prove an element of the offense charged; (3) a finding that the specific issue upon which the evidence of misconduct is offered is one which has been affirmatively contested by the accused; (4) a finding that the alleged misconduct did not occur at a place in time which is remote; (5) a finding that under the circumstances the government would be prejudiced by exclusion of the evidence, and (6) a finding that under the circumstances the probative value of the evidence outweighs its prejudicial effect.

See, *United States v. Urdiales,* 523 F.2d 1245 (5th Cir. 1975); *United States v. Ring,* 513 F.2d 1001 (6th Cir. 1975); *United States v. Broadway,* 477 F.2d 991 (5th Cir. 1973). If the evidence is admitted the Court must issue a cautionary instruction to the jury about the proper purposes for which said evidence may be considered. *United States v. Ring,* supra.

The objected-to evidence in this case clearly fails to meet the standards of admissibility. It certainly cannot be argued that it was plain, clear and convincing evidence of misconduct. What specific misdeed is the Petitioner alleged to have done? When did it occur? Where did it occur? How can it be defended against? Certainly no alibi is possible. This is further compounded by the hearsay nature of the evidence. A vague assertion from a live witness that the defendant on trial is evil is certainly prejudicial. But a vague assertion from an unsworn ghost of questionable reliability and not subject to cross-examination, suggesting that the defendant has been "dealing dope" for thirty years is undefensible. That it allegedly came from the defendant's own brother is devastating.

That the evidence is remote is an understatement. Evidence that the accused, at a time fairly recent to the events currently in question, engaged in specific conduct similar to that with which he is charged may have some probative value. But to extend the rule to include conduct occurring thirty, twenty, or even ten years preceeding the indictment in the name of relevance is absurd.

Upon what element of the offense was such evidence offered and how was that element contested? To say that a "not guilty" plea affirmatively contests all the

elements of the offense to the extent that extraneous offenses become admissible is to say that every person who assets his innocence may have to answer for every misdeed in his life. That cannot be the law.

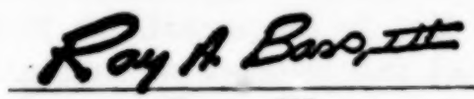
At trial, the only justification for admissibility that was offered by the government was that the statement was made by a co-conspirator in furtherance of the conspiracy. If that is justification for admitting such prejudicial evidence, then every person accused of conspiracy must come to court prepared to defend against alleged misdeeds, the atrocity of which are limited only by the imagination of his absent and unsworn accusor or by the imagination of government witnesses. That cannot be the law. In this regard, the Fifth Circuit recently suggested that evidence which qualifies as an exception to the hearsay rule is not necessarily admissible over an objection that the same evidence improperly refers to specific misdeeds of the defendant. *United States v. Cox,* 536 F.2d 65 (5th Cir. 1976).

The case of *United States v. Stephens,* 492 F.2d 1367 (6th Cir. 1974) is almost identical to the case at bar. There a conviction for conspiracy to transport stolen merchandise was reversed because, over objection, a government witness was permitted to testify that the defendant had been introduced to him by an alleged co-conspirator as "a buyer of stolen merchandise." The Court rejected the government's argument that the testimony was admissible because it was the statement of a co-conspirator made in the presence of the accused and in furtherance of the conspiracy, holding that the evidence came within no exception to the *Michelson* rule which excludes evidence of other crimes.

Nor can it be denied that the evidence herein referred to was also prejudicial to the Petitioners Richard and Roger Martinez. Evidence that their father, a man with whom they are jointly accused and tried, had been involved in the narcotics business for thirty years surely was calculated to prejudice them in the eyes of the jury. The trial court should have immediately declared a mistrial.

CONCLUSION

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.



RAY A. BASS, III

HAYNES & FULLENWEIDER
2701 Fannin
Houston, Texas 77002
(713) 659-8989

Attorneys for Petitioners

September 1977

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Rogelio MARTINEZ, Richard Martinez,
and Roger Martinez,
Defendants-Appellants.

NO. 76-4445

Summary Calendar

UNITED STATES COURT OF APPEALS
Fifth Circuit

July 13, 1977

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Appellants are a father and two of his sons, who have been convicted by a jury of conspiring to possess heroin with the intent to distribute, and of conspiring to distribute heroin.

On appeal, they allege that (1) there was insufficient indpendent evidence of the existence of a conspiracy; (2) that the extrajudicial statements of one of the co-conspirators should not have been allowed in evidence; (3) that the trial venue was improper; (4) that the trial

should have been continued because of the absence of a necessary witness; and (5) that a DEA agent testified about a telephone call between himself and someone a co-conspirator told him was one of the appellants.

[1] However, after a review of the record in this case, we find that there was ample evidence of the existence of a conspiracy to possess and distribute heroin, and of the membership of these appellants in that conspiracy and their participation in the furtherance of its ends.

On two occasions the co-conspirators went to Houston to obtain heroin. On both occasions they went directly to the home of Rogelio Martinez, where they met with Rogelio and his sons, Richard and Roger. Following each meeting with the alleged buyers, the co-conspirators would either go to Rogelio's home or meet with Rogelio and his sons. No heroin transaction was completed in Houston only because Rogelio insisted that the deal be closed at his house and he broke off negotiations after he detected the surveillance of his home.

This Court must view the evidence presented by the government in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Whether the evidence is direct or circumstantial, the question of the defendant's guilt is for the jury to decide unless the trial judge, viewing the evidence in the light most favorable to the government, concludes that the jury would necessarily have to have a reasonable doubt. *United States v. Reynolds,* 5 Cir. 1975, 511 F.2d 603; *United States v. James,* 5 Cir. 1975, 510 F.2d 546, cert. denied sub nom. *Vasquez v. United States,* 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1975). All reasonable inferences and credibility choices

must be made in favor of the jury verdict. *United States v. Black,* 5 Cir. 1974, 497 F.2d 1039, 1041. We have recently held that we must sustain a jury verdict where there is substantial evidence under the *Glasser* test to support that verdict, as there is here.

[2] At trial, both government undercover agents testified to extrajudicial statements made by Hector Martinez during the term of this conspiracy which implicated the appellants. Such statements were crucial to the government's case, and the agents were subjected to extensive cross-examination. Such statements did not violate appellant's Sixth Amendment rights to confrontation. *Park v. Huff,* 5 Cir. 1975, 506 F.2d 849, cert. denied 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975).

[3, 4] Although appellants are from Houston, and several of the overt acts involving appellants occurred in Houston, this conspiracy was formed, and at least nine of the overt acts in this conspiracy occurred in Laredo; therefore, trial in the Laredo Division of the Southern District of Texas was proper. A conspiracy may be prosecuted in the district where it was formed or in the district in which an overt act was committed in furtherance of its objects. *United States v. Strickland,* 5 Cir. 1974, 493 F.2d 182, cert. denied 419 U.S. 801, 95 S.Ct. 9, 42 L.Ed.2d 32 (1974).

[5] Appellants requested a continuance because of the absence of Hector Martinez, one of the indicted co-conspirators. The judge did not abuse his discretion in refusing this continuance because Hector was at that time incarcerated in Nuevo Laredo, Mexico, outside of our federal jurisdiction, his release date was unknown, and there were no assurances that he would testify if called.

[6] Appellant's final assertion of error concerns the admission into evidence of a telephone conversation between DEA Agent Castro and Rogelio Martinez, the alleged source of the heroin for which the agents had gone to Houston. Castro had never met Rogelio, and did not know the sound of his voice. However, there was sufficient circumstantial evidence surrounding the call that the jury could reasonably have concluded that the party being spoken to was indeed Rogelio. *Grogan v. United States,* 5 Cir. 1967, 394 F.2d 287, cert. denied 393 U.S. 830, 89 S.Ct. 97, 21 L.Ed.2d 100 (1967). The judge did not abuse his discretion in allowing the evidence of this call to go to the jury. *United States v. John,* 7 Cir. 1975, 518 F.2d 705; *United States v. Biondo,* 8 Cir. 1974, 483 F.2d 635, cert. denied 415 U.S. 947, 94 S.Ct. 1468, 39 L.Ed.2d 563 (1974).

The other issues raised by appellants are likewise without merit.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 76-4445

Summary Calendar

D. C. Docket No. CR-76-L-81

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROGELIO MARTINEZ, RICHARD MARTINEZ
and ROGER MARTINEZ,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

Before GOLDBERG, CLARK and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 13, 1977

Issued as Mandate:

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 76-4445

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ROGELIO MARTINEZ, RICHARD MARTINEZ
and ROGER MARTINEZ,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(August 11, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge